U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: August 22, 2000

CASE NO: 2000-INA-63

In the Matter of

JIL INDUSTRIES, LTD.
Employer

on behalf of

IDO EILAM
Alien

Appearances: Ralph A. Donabed, Esq.
For Employer and Alien

Certifying Officer: Raimundo A. Lopez, Region I

Before: Burke, Huddleston, and Jarvis
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from JIL Industries, Ltd.'s ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is

to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On February 6, 1997, the Employer filed a Form ETA 750, Application for Alien Labor Certification, with the Massachusetts Division of Employment and Training (DET) on behalf of the Alien, Ido Eilam. (AF 90-91). The job opportunity was listed as "Director of Business Development," and the job duties were listed as follows:

> Director of Business Development for Direct Marketer and Manufacturer of Outdoor Products: Will design, develop and implement strategic marketing and distribution plan for expansion into emerging international markets, more specifically the Mediterranean and Middle East. Will search international markets for new product ideas and lead the development of the business plan for each.

(AF 90). The stated job requirements for the position, as set forth on the application, are an M.B.A. in Marketing with the following special requirements:

> Must have M.B.A. in Marketing or B.S. and 3 years exp. in marketing. Experience in successful new product development from a strategic business viewpoint including demonstrated ability in developing sales and marketing strategies. In-depth knowledge of Statistical Analysis and a technical or operations background to assist in directing production and R&D subsidiaries. Broad international experience. Demonstrated ability to work in high growth/high stress environment. Excellent communication skills.

(Id.).

DET transmitted resumes from eight U.S. applicants to the Employer from August 12, 1997 to October 20, 1997. (AF 41-45, 49-62). The Results of Recruitment Report indicated that none of the U.S. applicants was hired. (AF 40,47-48). The file was transmitted to the CO on January 13, 1998. (AF 37-38).

The CO issued a Notice of Findings ("NOF") on June 2, 1998, proposing to deny the certification for two reasons. (AF 35-36). First, the CO found Employer's special requirements to be unduly restrictive and tailored to the skills of the Alien in violation of Sections 656.21(b)(2), 656.21(b)(2)(i) and 656.21(b)(6). (AF 35). Second, the CO found that no bona fide employer/employee relationship exists as required by Section 656.20(c)(8). (Id.). The CO found it "very odd that the alien was Vice President and then President of the company that is petitioning on his behalf, and now is being sponsored as Director of Business Development." (AF 36). The CO questioned Employer as to why the Alien is being offered a lower position in the company hierarchy than he previously held and stated that it seems as though the Alien may have some financial interest in this company, "which would expressly prohibit him from being sponsored by this company." (Id.). Employer was instructed to submit all business related documents which show who the partners in the business are and/or who the stock holders are. Finally, the CO noted that since the employer's job requirements appear to be unduly restrictive it was impossible to make a complete determination with regard to the validity of the rejection of the U.S. applicants who submitted resumes, and therefore, this determination would not be attempted until Employer submits rebuttal evidence which provides clarification with regard to its actual minimum job requirements.

Employer submitted its rebuttal on July 7, 1998. (AF 17-33). The rebuttal consisted of a letter from Employer's president addressing the issues raised in the NOF including an explanation of the minimum requirements stated in the application and documentation to show the Alien's ownership interest. The Employer asserted that the special requirements as set forth on its Form ETA 750 are the minimum requirements for the position. Employer explained that these requirements were developed by analyzing the avenues of potential growth, and by recognizing that the growth of the company has been due to its direct marketing strategy. Employer further stated that as a small business with limited support staff, "JIL Industries needs multi-disciplined management with a variety of skills to handle the various tasks for which the Director of Business Development will be responsible." (AF 22). Employer also addressed the CO's findings regarding the relationship between Employer and the Alien and asserted that the Alien does not have an ownership interest in the sponsoring Employer. Employer stated that the Alien is not involved in the management of the company or in decisions relative to the corporate affairs of the company and that the qualifications for the job are based upon the company's business needs and are not tailored to the Alien's background or personal attributes. Documentation was provided in the form of a copy of the Schedule K-1, Shareholder's Share of Income, Credits, Deductions etc. for JIL Industries, Inc. for the years 1994 through 1997 and a copy of the Schedule I to Agreement of Limited Partnership of JIL Industries Limited Partnership. (AF 29-33). Employer's president provided the following information:

> JIL Industries, Inc. was incorporated in 1988 and was financed solely by my financial contributions. As part of an offer of employment, Mr. Ido Eilam was promised options to become a minority shareholder in that company. In January 1994, the company was restructured and Mr. Eilam's shares were bought back. At that time, a new Limited Partnership, JIL Industries, Ltd. was created. JIL Industries, Inc. is the sole General Partner of JIL Industries, Ltd. and has a 77.1% ownership. The awning business was

> transferred from JIL Industries, Inc. to JIL Ltd. Mr. Eilam is a limited partner of JIL Industries, Ltd. and has an 11.5 % ownership interest. He has no ownership in JIL Industries, Inc., the holding company.

(AF 25). Employer asserted that the Alien was employed by JIL Industries from 1989 to 1991 as Vice-President of Operations and from 1991 to 1995 as President, and that the offered position has many more challenges than his prior position as President, offering the Alien greater opportunities and is not "a lower position than that which he previously held." (AF 26).

On November 30, 1998, the CO issued a Final Determination ("FD") denying certification. (AF 15-16). The CO found that pursuant to regulations at 20 C.F.R. 656.20(c)(8), a bona fide job opening must exist to which qualified U.S. workers could be referred and that it appears that the position as described in the application is open only to the alien. The CO noted that while the alien is only a limited partner in the company, "he is never the less an investor who owns 11.45 % of the company. While he may not make all of the decisions for the company, it seems unlikely that the other stock holders would hire someone other than the alien." (AF 16). In addition, the CO found that the Alien must have some influence over decision making at the company due to his vested interest in the company and "for the same reason it seems very unlikely that he would displace himself for another individual." (Id.).

On December 30, 1998, the Employer filed a Motion for Reconsideration. (AF 3-14). Employer argued that the Alien's minor investment in JIL Industries, Ltd. is not significant enough to find a lack of employer/employee relationship or lack of a bona fide job opportunity, pursuant to the definition of employment set forth in 20 C.F.R. Sections 656.3, 656.20(c)(8) and the totality of circumstances test set forth in *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*). The CO denied Employer's Motion for Reconsideration on June 10, 1999. (AF 1).

Discussion

Where an alien for whom labor certification is sought has an ownership interest in, or some other special relationship with, the sponsoring employer, the employer must demonstrate that a bona fide job opportunity exists for qualified U.S. applicants and that, if hired, the alien will not be self-employed. 20 C.F.R. §§ 656.20(c)(8), 656.50. The regulatory definition of "employment" found in Section 656.50 states: "'Employment' means permanent full-time work by an employee for an employer other than oneself." Thus, if the alien or close family members have a substantial ownership interest in the sponsoring employer, the burden is on the employer to establish that employment of the alien is not tantamount to self-employment, and therefore a per se bar to labor certification. *See Hall v. McLaughlin*, 864 F. 2d 868, 870 (D.C. Cir. 1989); *Modular Container Systems, Inc., supra*. The sponsoring employer can overcome this regulatory proscription if it can establish genuine independence and vitality not dependent on the alien's financial contribution. *Modular Container Systems, Inc., supra*.

In this instance, although the Alien only owns an 11.4% interest in the sponsoring employer, the Alien is one of only two limited partners in the company. The Alien was promised options to become a minority shareholder in the original company JIL Industries, Inc., in 1988, and upon the company's restructuring into a limited partnership in 1994, the Alien's shares in JIL Industries Inc. were bought back by JIL Industries Inc. and the Alien became a limited partner in the new company JIL Industries, Ltd. The CO was correct, therefore, in questioning whether a bona fide job opportunity exists. 20 C.F.R. § 656.20(c)(8).

In *Modular Container Systems, supra*, the Board clarified the test for the existence of a bona fide job opportunity where the alien is an investor or has some other special relationship with the employer. In that case, the factors to be examined may include, but are not limited to whether the alien (1) is in a position to control or influence hiring decisions regarding the job for which labor certification is sought; (2) is related to the corporate directors, officers or employees; (3) was an incorporator or founder of the company; (4) has an ownership interest in the company; (5) is involved in the management of the company; (6) is one of a small number of employees; (7) has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and (8) is so inseparable from the sponsoring employer because of his pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the Alien.

In its rebuttal, Employer's President asserts that the Alien does not have an ownership interest in the sponsoring employer nor is he involved in the management of the company or in the decisions relative to the corporate affairs of the company. Employer further argues that the company has operated and will continue to operate without the Alien and that the Alien does not have control nor influence hiring decisions regarding the position for which the labor certification is sought. In addition, Employer maintains that although the Alien has previously been employed as the President and Vice-President of the company before returning to Israel, the offered position of Director of Business Development is not a lower position than that which he previously held. (AF 26). Bare assertions, however, as have been made by Employer's President, are not sufficient to overcome the evidence of the Alien's ownership or control in this case. *Giro Investments, Inc.*, 1997-INA-392 (Sept. 24, 1997). There are only three owners of this corporation: the general partner, JIL Industries, Inc., which Employer asserts the Alien has no ownership in, and two limited partners, the Alien and one other person. Employer asserts that JIL Industries, Inc. is solely owned by the Employer's president, Jonathan Hershberg. (AF 7).

The Alien and the other limited partner each own an 11.45% interest in the company. Mr. Hershberg owns a 77.10% interest in the company. Employer's counsel asserts that the Alien is neither on the board of directors or related to a board member, any corporate directors, officers, or employees of JIL Industries, Inc., the General Partner, or related to any partners or employees of JIL Industries, Ltd.. Employer's counsel further asserts that the Alien was "neither the original incorporator of JIL Industries, Inc. nor a founder of JIL Industries, Ltd. Mr. Eilam, is one of 53 employees at JIL Industries, hence he is hardly one of a small number of employees." (AF 11). Employer, however, did not provide any

documentation to support these bare assertions, such as a list of the board members, corporate directors, officers and employees of JIL Industries, Inc. and JIL Industries, Ltd.

Employer cites *Human Performance Measurement, Inc.*, 1989-INA-269 (Oct. 25, 1991) (*en banc*), as being on point. However, unlike *Human Performance*, Alien herein has more than a "collegial and professional relationship with the sponsoring employer." His ownership is more than the 4% cited by the Board for the alien in *Human Performance*, and unlike that case where there were thirty (30) shareholders, here there are only three shareholders. Further, in this case it appears that the Alien is more than a mere investor in the company. He was a shareholder in the original company when it was first incorporated in 1988, when he was offered stock options to become a minority shareholder in the company as part of an offer of employment. The implications of this past transaction suggest that something more than a professional relationship exists between Employer and the Alien, in light of the fact that Employer is not offering any incentives to U.S. applicants. In addition, Alien worked as Vice President of Operations from 1989 through 1991 and then as President from 1991 to 1995. Employer argues that the offered position is not a step down from the Alien's former position as President of the company, however, Employer has provided no supporting evidence to show the hierarchy of the positions at the company and has not provided any documents providing job descriptions or other proof that the position of Director of Business Development is a greater opportunity at the company than that of President.

Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA -659 (Jan. 13, 1988) (en banc), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. In the instant case, Employer's rebuttal regarding the issue of a bona fide job opportunity and the issue of the Alien's control or ownership, consists of no more than bare assertions, with no supporting reasoning or evidence. The only documents Employer submitted were those tax forms substantiating the fact that the Alien is one of two limited partners owning an 11.45% interest in the company. This is not sufficient to overcome the findings rendered by the CO. Based upon the facts in this case, the CO properly determined that a bona fide job opportunity does not exist.

For the above-noted reasons, labor certification was properly denied.

Order

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California